

Unions NSW v NSW: The High Court's consideration of the proportionality test

The High Court of Australia upheld the implied freedom of political communication in its first decision of 2019. Nicola Nygh and Sam Wheeler discuss the jurisprudence underpinning this decision.

Sections 7 and 24 of the Commonwealth Constitution provide that Parliament will be “composed of members directly chosen by the people”.

Those deceptively simple words lay the foundation of Australia's representative democracy. The implication of those words, however, is far from simple. From those words, the High Court has implied a limited Constitutional guarantee of freedom of communication on governmental and political matters.

In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Deane and Toohey JJ said:

“The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person.”

Whilst battles over the implied freedom of political communication do not capture the public imagination in Australia in the same way as the politicised fights over the First Amendment and free speech in the United States, they nonetheless exist. Those fights have important implications to a variety of matters, including the regulation of our elections.

In its first decision of the year, *Unions NSW v New South Wales* [2019] HCA 1, the High Court unanimously struck down provisions in the New South Wales Government's recent reforms to its electoral laws capping the amount that third party campaigners (including unions) could spend during an election campaign. The Court found that the NSW Government had failed to prove that the amount of the cap was justified. As a result, the High Court found that the electoral laws impermissibly burdened the Constitution's implied freedom of political communication.

In reaching this conclusion, Kiefel CJ, Bell J and Keane J explicitly applied a test of proportionality.

The test of proportionality

In a 2015 decision, a majority of the High Court set out the test for determining whether a law infringed on the implied freedom of political communication. That test is often referred to as the ‘proportionality test’.

Generally speaking, the proportionality test requires consideration of whether:

1. the law in question burdens the constitutional freedom in terms, operation or effect; and
2. the purpose and means of the proposed law are compatible with the constitutional freedom; and
3. whether any restriction from the proposed law are suitable, necessary or adequate in its balance (i.e. is the restriction proportionable?).

Whilst the development of the proportionality test is novel in Australian jurisprudence, the application of similar principles can be found in other jurisdictions. Indeed, the Australian

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proportionality test has been said to originate from the German principle, *Verhältnismäßigkeitsprinzip*.

Nevertheless, the implementation of the proportionality test in Australian jurisprudence is not without criticism. The complex and detailed analysis required to apply the proportionality test begs the question – are we reading too much into the words “*composed of members directly chosen by the people*”?

Contacts

For more information, please contact:

Michael Daniel

michael.daniel@rllawyers.com.au
(02) 8298 6001

Nicola Nygh

nicola.nygh@rllawyers.com.au
(02) 8298 6004

Sam Wheeler

sam.wheeler@rllawyers.com.au
(02) 8298 6013

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